

Labour Market Politics through Jurisprudence: The Influence of the Judgements of the European Court of Justice (Viking, Laval, Ruffert, Luxembourg) on Labour Market Policies

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Abstract

Recent judgements of the European Court of Justice (ECJ) – on Viking, Laval, Ruffert and Luxembourg – systematically prioritised economic freedoms against fundamental social rights. The decisions produced widespread debates not only in the European countries concerned. Critics warned of a radicalization of the internal market integration with negative consequences for the European welfare states. The cases not only raise the question of the relation between European law and national law, but have impacts on national industrial relations systems and therefore on labour market policies of the member states. The countries came under pressure to respond to the judgements and had to adjust their policies accordingly. Regarding the consequences of the decisions it is necessary, however, to differentiate between national systems. Due to the diversity of the different systems of industrial relations, the impacts of the cases differ from country to country. In this article, it will be shown how member states, which were the trigger for the respective ECJ decisions or which are particularly effected by the judgements, respond to the ECJ jurisprudence.

1 Introduction

At the end of 2007 the European Court of Justice (ECJ) went through several extremely controversial judgements which contained juridical and political explosives. The important decisions on Viking (ECJ, Case C-438/05 Viking (2007) ECR I-10779-10840) and Laval (ECJ, Case C-341/05 Laval (2007) ECR I-11767-118904) dealt with the compatibility of national collective labour law with the requirements of European law and have imposed as a consequence restrictions on strike action by trade unions. In the judgements on Ruffert (ECJ, Case C-346/06

Rüffert (2008) ECR I-1989) and Commission against Luxembourg (ECJ, Case C-319/06, NZA 2008: 865), collective agreement clauses in public procurement law and a national implementation legislation of the posting of workers directive were declared contrary to community law. In the judgements economic freedoms have been systematically prioritised against fundamental social rights.

The decisions produced widespread debates not only in the European countries concerned. Critics warned of a radicalization of the internal market integration with negative consequences for the European welfare states (see different sources on: <http://www.etui.org/Headline-issues/Viking-Laval-Rueffert-Luxembourg>). The fear is not new that national scope of action is limited by European regulations, but the sharp reaction indicate, that it now has come to a new level of restrictions: national institutions of negotiating partners and decision arenas are targeted and limited, a field on which the countries until now could operate freely. Cologne-based political economist Fritz Scharpf even calls for a boycott of the judgements: “the only way is not to follow the ECJ” (Scharpf 2008: 19 ff.).

The cases not only raise the question of the relation between European law and national law, but have impacts on national industrial relations systems and therefore on labour market policies of the member states. The countries are under pressure to respond to the judgements and have to adjust their policies accordingly. Regarding the consequences of the decisions on Viking – Laval – Rüffert and Luxembourg it is necessary however to differentiate between national systems. Due to the diversity of the different systems of industrial relations, the impact of the cases differ from country to country. The scope of action of governments, national trade unions and employers’ organizations is restricted to differing degrees by the ECJ decisions. This leads to a reduction of the rights of workers and trade unions.

In this analysis, it will be shown how member states, which were the trigger for the respective ECJ decisions or which are particularly effected by the judgements, respond to the ECJ jurisprudence - although the article cannot cover the issue conclusively.

2 Historical background

The European Community (EC) was started in 1957 as a project of market integration, based upon the idea of the “four liberties”: free movement of goods, services, capital and persons. Trade barriers were reduced between EC member states to achieve a common market in Europe. The European Economic Community’s scope was limited to economic policy with social policy being excluded. The guiding principle was that individuals from other member states should enjoy the same rights as nationals concerning terms of investment, access to labour market, trade in goods and provisions of services. The European Institutions (Commission and ECJ) were given the task by the treaties to ensure that these principles were upheld. Since then Commission and ECJ gradually empowered themselves and increasingly shifted the boundaries between national law and European law at the expense of the member states (Höpner 2008: 2).

The enhancement of the fundamental freedoms was based upon the idea to form the project of the European Union on the basis of a gradual market extension. Although social policy initiatives tried to correct market-processes in terms of a “positive integration”, EU policy primarily focussed on the establishment of economic freedom of movement. This was manifested with the primacy of a market-related “negative integration” (Blanke 2008: 5-6), which means reduction of trade barriers and de-regulation without re-regulation.

The first (small) social corrections were made with the establishment of the European Union (EU) through the treaty of Maastricht, when the formation of a common European market and a single currency with sharp interventions into the autonomy of the member states in this area, made quite clear that there was a lack of social integration. The consequent lack of legitimacy felt by the European population led to the protocol and the convention on “social dialogue” of 1992, which was finally integrated in the treaty of Amsterdam (1997) with the revision of the EC treaty. This social convention considerably enlarged the EU competences on social policy. In addition, the majority principle was imposed for important legislative decisions of the council of the European Union and the social partners got a more important role in the legislative procedure. The treaty of Nice

(2001) contained regulations to allow the smooth institutional operation of the enlarged Union, especially by reforming the consistence and functioning of the European institutions. Finally, on 1 December 2009, the treaty of Lisbon came into force, which refers in Art. 6 TEU to the charter of fundamental rights of the European Union. It remains to be seen if this will strengthen the fundamental rights of the charter (Schömann 2010: 1 ff.).

In any case it becomes clear that there is a contradiction between the slow turning of the EU to more social rights and the outlined ECJ judgements in which market freedoms have priority over social rights.

3 The questionable judgements of the European Court of Justice

Given the fact that the authority of the EU in social policy gradually expanded (according to the treaties of Amsterdam, Nice and Lisbon) it is important to note, that law created by judges, such as jurisdiction by the ECJ, increasingly affects social policy. Recent judgements on collective labour law (Viking, Laval etc.) however, are controversial because they may interfere too much in the autonomy of the member states concerning their system of industrial relation.

3.1 The Viking case

The shipping line Viking provides ferry services between Finland and Estonia. The company decided to reflag their ferries under the Estonian flag. One reason for this decision was to employ the crew at lower Estonian wages. In response, the Finnish Seamen's Union (FSU) decided to take collective action against Viking to stop the re-flagging process. Furthermore, FSU requested the International Transport Workers' Federation (ITF) to ask their members outside Finland not to enter in any negotiations with Viking. The coordinated strategy of the ITF states that only the union of the country where the vessel's owner is based has the right to collective bargaining for the crew (for further information see: ITF 2011).

The ECJ declared the threatened trade union action against the re-flagging of Viking to be incompatible with the European Union law. The court argues, that the freedom of establishment

under Art. 49 TFEU (ex-Art. 43 EC) is guaranteed as a fundamental (economic) freedom, which not only serves as a defensive right against government interference, but also has “horizontal direct effect” against the restriction by private third parties. Considered as such are also trade unions (ECJ, C-438/05, par. 61, 66), whose right to take collective action is seen as a restriction on the freedom to provide services and the freedom of establishment. Such action by trade unions is recognized only as justified by the ECJ, if the collective action has a legitimate aim, is justified by overriding reasons of public interest, suited to attaining the objective pursued and does not go beyond what is necessary in order to attain it (ECJ, C-438/05, par.75).

In concrete terms, according to the ECJ first the jobs and working conditions of the seafarers would have had to have been severely compromised and secondly the union would have had to have used more lenient instruments than the threat of strike and boycott. Incidentally the threatened boycott by the ITF-members as part of a general strategy would overshoot the mark.

In contrast to the absolute granted fundamental (economic) freedoms, trade unions’ fundamental rights are thus treated as imposed barriers. Collective action hence is put to a test of its proportionality which would have been considered as interference in fundamental union rights if it had been performed in that form on national level. At any rate the ECJ sets strict guidelines on how national courts should judge such cases.

Although in the Viking case the ECJ acknowledged for the first time the right to take collective action and the right to strike as fundamental rights, the court gives priority to the fundamental (economic) freedoms over the fundamental (union) rights.

3.2 The Laval Case

The Latvian construction company Laval renovated a school near Stockholm employing posted Latvian workers at Latvian wages. The Swedish Construction union Byggnads started negotiations with Laval to achieve Swedish collective agreements on wages and other working conditions, which in Sweden are always negotiated on a case-by-case basis. To benefit from lower wages in Latvia, Laval stopped the negotiations with Byggnads and signed a collective agreement with a Latvian trade union instead. Thereupon Byggnads started to blockade the construction sites of Laval, later on supported by solidarity action from the Swedish

electricians' trade union. Industrial action was lawful, because Swedish law limited the peace obligation to collective agreements which are directly subject to Swedish law ("lex Britannia"¹). Collective agreements with trade unions from other member states thus did not cause the peace obligation.

It is common practice in Sweden to push all companies that are economically active in the country through independent trade union action to the conclusion of collective agreements. By adopting the so-called "lex Britannia" the Swedish legislator explicitly legitimized this practice. Given the high union density in Sweden² (Koch 2009: 23), this is the Swedish form to achieve generally binding validity of collective agreements. This is also the Swedish specific form to transpose the European posting of workers directive (PWD), which is not carried out by statutory extension of collectively agreed minimum working conditions, like in Germany or many other European countries.

Judicial proceedings before the Swedish Labour Court especially dealt with the legality of union industrial action in the case. According to the Labour Court the main legally relevant question was if Art. 42 (3) MBL could be applied or if it would be an infringement of European law.

According to the ECJ, to which the question was submitted, the collective action taken violates the freedom of services of Art. 56 TFEU (ex Art. 49 EC), as it would lead to an unequal treatment of foreign EU-collective agreements in relation to national collective agreements (ECJ, C-341/05, par. 56 and 66).

The court also argues that, with respect to legal clarity and legal certainty, that for a foreign company it would not be sufficiently transparent, which tariff of working conditions would be applicable on the employment of the posted workers.

Moreover, the ECJ again applies the proportionality test. The industrial action which was used by the Swedish unions to protect the interests of the (Swedish) host state workers against social dumping may indeed constitute an overriding reason of

¹ The "Lex Britannia" consists of three provisions which were inserted in the Swedish law on workers' participation in decisions (Medbestämmandelagen, "the MBL"). In accordance with Art. 42 (3) MBL, the provisions on peace-obligation for collective action are not directly applicable to collective agreements concluded by foreign employers with foreign trade unions. The provision thus abolishes the peace-obligation for collective action against foreign employers carrying out temporary activities in Sweden. Name to the "Lex Britannia" was the ship "Britannia", which was used under a foreign flag in Sweden.

² 73 % of all Swedish workers are organized in trade unions, including individual work contracts referring to collective bargaining agreements, 90 % of all workers are covered.

public interest and could, in principle, justify a restriction of one of the fundamental freedoms (ECJ, C-341/05, par. 103). Generally, blockading action by a trade union which is aimed at ensuring that posted workers have their terms and conditions of employment fixed at a certain level, falls within the objective of protecting workers (ECJ, C-341/05, par. 107). But in the concrete case the action could neither be justified by regulations of the posting of workers directive nor by overriding reasons of public interests.

Moreover, the ECJ criticized the Swedish form of implementation of the posting of workers directive. The directive (96/71) would merely allow in Art. 3 (1) to set up minimum rates of pay; the Swedish trade unions would have wanted to achieve, however, collective bargaining agreements covering the whole wage range and not minimum wages. This type of wage determination of the Swedish system would not be in accordance with the means set out in that regard in Art. 3 (1) and 8 of the directive (ECJ, C-341/05, par. 70). The Swedish system of industrial relations is insofar considered incompatible with primary and secondary EU-law, which means that Art. 42 (3) MBL could not be applied.

Summing up, it must be emphasized that the ECJ laid down a new interpretation regarding the posting of workers directive. The directive lays down a nucleus of mandatory rules for minimum protection to be observed in the host country by employers who post workers in the territory of a member state to perform temporary work. As all directives in the social field, it stipulates a “hard core” of clearly defined protective minimum standards that member states have to assure. So far, the directive has been interpreted in such a way, that it does not preclude higher standards (Warneck 2010: 10; as well Advocate General Mengozzi in his conclusions to Case C-341/05). With the Laval case the ECJ formulates a radical renunciation from the previous interpretation. The ECJ considers the regulations of the PWD as final rules of internationally binding workers protection law. Neither the host member state nor the social partners shall be allowed to set up higher standards which go beyond the mandatory rules of the directive for a minimum protection. This represents a change from a minimum to a maximum directive (Warneck 2010: 10).

3.3 *Rüffert*³

The public procurement law of the German Land Lower Saxony stated in § 3 that “contracts for building services shall be awarded only to undertakings which, when lodging a tender, undertake in writing to pay their employees, when performing those services, at least the remuneration prescribed by the collective agreement in the place where those services are performed ...”. Public works contracts therefore were to be awarded only to firms that paid collectively agreed wages, which was guaranteed by a so-called “*Tariftreueerklärung*”, a declaration regarding compliance with collective agreements. In the construction of a prison in Niedersachsen it was found that a Polish subcontractor paid less than half of the minimum wage obligatory in the construction sector, the 53 Polish workers only received 46,57 % of what was paid to their German colleagues. This means that the declaration regarding compliance with collective agreements was violated. Therefore the German Land Lower Saxony terminated the contract and the (German) company finally went into bankruptcy.

The legal question of the *Rüffert* case was, if the public procurement law of Niedersachsen with its system of “*Tariftreueerklärungen*” would be in compliance with European law. The German Federal Constitutional Court anyhow considered it in 2006 to be in accordance with the German constitution, just as the question was submitted to the ECJ.

According to the EJC, the legitimacy of the procurement law in dispute is to be assessed on the basis of the posting of workers directive 96/71. As already in the ruling of the *Laval* case, the ECJ reiterates again, that the PWD would merely allow codifying minimum standards of working conditions by laws, regulations or statutory provisions and/or by collective agreements or arbitration awards which have been declared universally applicable (ECJ, C-346/06, par. 21 ff). These requirements would not have been met in this case. This follows in particular from the fact that the public procurement law itself would not set up minimum rates of pay, but would refer only to collective bargaining agreements, which could not be considered as law.

³ *Rüffert* is the name of the German liquidator involved in the case because of the bankruptcy.

The relevant collective wage agreement, however, had not been declared universally applicable and – because of the public procurement law – would incidentally be applied to cases of public procurement only and not to contract awarding by private persons.

The court emphasises, that the PWD would outline the maximum level of protection for posted workers. It would further be incompatible with the free movement of services of Art. 56 TFEU (ex Art. 49 EC) to attach the condition to public procurement contracts that collectively agreed wage structures should be adhered to. Rules like that would have to be binding for all companies and not only for those with public procurement contracts.

3.4 Luxembourg

2006 the European Commission filed a lawsuit against Luxembourg before the ECJ under the infringement procedure since it considered Luxembourg's current labour legislation not in line with the Posted Workers Directive. The ECJ explored the question if Luxembourg was in accordance with European law, when they declared all labour law provisions and all their collective agreements applicable to posted workers.

Implementing the Posted Workers Directive, Luxembourg brought all national binding labour law regulation including all the collective agreements under the term 'public policy provisions', which allows going beyond the specifications set out in Article 3 paragraph 1 subparagraph 1 of Directive 96/71 of minimum standards which have to be guaranteed for posted workers. This implicates, that foreign service providers had to respect all labour law regulations in Luxembourg including all relevant collective agreements. The Commission criticised that Luxembourg would interpret the term 'public policy provisions' too widely.

The two most important controversial issues were: The automatic adjustment of pay to changes in the cost of living and the respect that all collective agreements were covered.

The ECJ upheld the Commission's complaint on 19 June 2008 saying that the way in which Luxembourg has implemented the Posted Workers Directive would be an obstacle to the fundamental principle of freedom to provide services. Any exception to this principle, such as in the PWD would have to be

interpreted strictly. The ECJ states that “the classification of national provisions by a Member State as public-order legislation applies to national provisions compliance with which has been deemed to be so crucial for the protection of the political, social or economic order in the Member State concerned as to require compliance therewith ...” (ECJ, C-319/06, par. 29). According to the ECJ, Luxembourg failed to prove that such a serious threat to a fundamental interest of society would exist.

The complete transfer of national regulations would violate the freedom of services. The ECJ emphasises the fact that indexation of wages concerns all wages, including those going beyond the minimum wage category settled in Art. 3 (1) of the PWD. Furthermore, not all collective agreements per se are to be defined as public policy. In any case, the ECJ makes clear that only collective agreements which have been declared universally applicable may be classified as public policy provisions.

As a result of the ECJ jurisprudence, Luxembourg had to change its law.

4 Impacts of the ECJ judgements on labour market politics – general remarks

An analysis of the impacts of the ECJ judgements should take into account current problems that influence labour market politics in the European Union like competition of business locations in different member states which leads to competition for investment and employment as well as relocation of companies to low-wage countries. Considering the pay gap (especially between older and newer member states), above all the freedom of movement leads to labour migration of employees and bogus self employment, which might grow in Germany and Austria after the complete liberalization from 1. May 2011 (for further information see: Lorenz 2010: 10 ff.).

Due to the diversity of the different systems, the impact of the Viking – Laval – Ruffert and Luxembourg cases differ from country to country. The scope of action of governments, national trade unions and employers’ organizations is restricted to different degrees by the ECJ decisions. In this analysis, it will be shown how member states which are particularly affected by the

judicature of the ECJ, respond to the ECJ jurisprudence, although further analyses will be necessary.

4.1 Impact of the ECJ jurisdiction Viking and Laval: strict proportionality test of industrial action

The labour market functions differently on each national level, but “social intervention” through collective agreements is a universally recognized structure characteristic of the member states. This led to the provision of Art. 153 (5) TFEU (ex-Art. 137 par. 5) whereby the community does not have the competence for questions concerning pay, the right of association, the right to strike or the right to impose lock-outs. Art. 152 TFEU also acknowledges the role of the social partners taking into account the diversity of national systems.

Nevertheless, the ECJ gave strict instructions on how national courts, for example, would have to interpret the right to strike. Industrial action by trade unions is recognized only as justified, if the collective action has a legitimate aim, is justified by overriding reasons of public interest, suited to attaining the objective pursued and does not go beyond what is necessary in order to attain it. As a legitimate interest which might justify a restriction of one of the fundamental freedoms by industrial action, the ECJ only accepts the protection of workers. As the PWD is considered as a final regulation, it is the only criteria of examination in cases of posted workers.⁴ It is also highly problematic, that analysing the demands of a trade union submits even the target of a labour dispute to a judicial review. It is in the very nature of negotiations that both parties set demands at their highest and seek a compromise through negotiation over time (Bercusson, 2007, p. 304).

This proportionality test is much stricter, than the proportionality test in several member states. The German jurisdiction for example, does not restrict the legitimate aim in

⁴ The ECJ uses the same proportionality test in case C-271/08 (Commission against Germany) from 15.07.2010 concerning the direct award of contracts, without a call for tenders at European Union level, to pension providers designated in a collective agreement concluded between management and labour.

the same way as the ECJ and acknowledges that trade unions have a margin of appreciation. Only obviously inappropriate measures of industrial action are not permitted (Zwanziger 2009: 20). The German national labour court for example, declares in its decision on solidarity strike, that as long as the respective demands may in principle be regulated by collective agreements, they are lawful (24.4.2007 – 1 AZR 252/06, AuR 2007: 180, 365). In Swedish law there is not even a proportionality test of industrial action, unions do have free choice of means (Koch 2009: 23).

The ECJ however disregards the democratic and representative function of autonomous collective bargaining (and of freedom of association), which leads to censorship (Kocher 2008a: 18).

Furthermore, after the Viking and Laval judgements fundamental freedoms are applicable also to the coalitions. Thus, conflicts are inevitable, because having an impact on economic activity is almost the purpose of the coalitions, particularly on the employee side (Zwanziger 2009: 12).

4.2 Need for legislative changes

Impacts of the ECJ jurisdiction on Laval

Unlike others, the Nordic system of industrial relations has a high level of organization, both on the employers' and workers' side. On average 70% of employees are members of a trade union. Therefore the social partners in the Nordic countries enjoy to a large extent self regulation, for example there are no statutory minimum wages but the social partners themselves regulate rates of pay and working conditions (Bruun/Jonsson 2010: 16-17). Therefore the European posting of workers directive was transposed in Sweden by including foreign companies into the system of flexible negotiation of collective agreements (Koch 2009: 23). When this practice referring to Art. 52 TFEU was declared inconsistent with EU-law by the ECJ because of discrimination against foreign companies, specific elements of the structure of industrial relations and of the welfare state in Sweden were ignored. The prohibition of trade unions to force foreign service providers by means of collective action into collective bargaining basically means that the areas in which collective bargaining can take place are now subject to legal

constraints emanating from EU legislation (Bruun/Jonsson 2010: 26-27, similar: Koch 2009: 25).

The Laval case makes it therefore clear that especially those systems without statutory extension (like Sweden or Denmark) collide with the system of industrial relations the ECJ takes as a basis of its jurisdiction especially concerning the PWD.

Especially in the Laval-case, even the danger for posting enterprises to have to participate in collective bargaining with a union, was seen as infringing the freedom to provide services (ECJ, C-341/05, par. 100). The prohibition of discrimination thus has to be considered in law on collective bargaining, as there is not a justification of a different treatment in question. If a legal system regulates how a host country has to deal with collective agreements, both domestic and those from other member states may not be treated unequally (Zwanziger 2009: 16; Schierle 2010: 6 ff.; Koch 2009: 25).

As a consequence of the ECJ jurisdiction on Laval, legislative changes in Sweden therefore were necessary. There will be neither a law imposing minimum wages nor a system of statutory extension of collective agreements. The new statutory provisions of the so called "lex Laval" rather regulate, under which circumstances industrial action against foreign companies operating in Sweden is justified. Companies from other EU countries must comply with the Swedish union negotiated rules on core conditions like minimum wage, working hours and leave entitlements as stipulated in nationwide collective agreements generally applied, to which the law on posting of workers refers in Art. 3 (8.1). In any case, the actual agreed conditions of posted workers must be more beneficial than the conditions laid down in the law on posting of workers (Ahlberg 2010; Däubler/Heuschmidt, § 11 Rn 104 ff.). However, companies can not be forced to sign the collective agreements as a whole and no industrial action is allowed, if the posted workers already obtain at least the same conditions in their home countries by a collective agreement or a separate contract of employment.

The concept of this new law refers to Art. 3 (8.1) PWD which contains provisions for countries without statutory extension: member states may base themselves on "collective agreements which are generally applied to all similar undertakings in the geographical area and which are applied throughout national

territory”. It remains to be seen whether this law is in compliance with European law

By all means, Swedish trade unions heavily criticise the statutory provisions because employers on the one hand could prevent industrial action by entering a sham contract, allowing them to finish the job and send the workers back home before the trade unions have had time to discover the false deal. There is also criticism against the fact that industrial action is not admissible even if foreign workers have joined a Swedish trade union (Ahlberg 2010).

Also Denmark felt obliged by the ECJ case law on Laval to make statutory changes in the implementation of the PWD, a new law entered into force on 1 January 2009. The Danish law relies upon Art. 3 (8.2) PWD, whereupon pay shall be regulated by collective agreements which were concluded between the most representative social partners. But unlike Sweden, Denmark interprets Art. 3 (8) PWD in a wider way. Danish trade unions may use collective action against foreign service providers in order to achieve a collective agreement on pay for posted workers, but the foreign service provider has to be informed about the content of the applicable collective agreement. The definition of what belongs to “pay” is laid down by statutory provision. “Payment” also includes costs regarding holidays and leave subsumed which makes it possible to “convert” the costs of a certain collective agreement into a fixed sum in cash. Such a calculation makes the costs of payment for a posted worker equivalent to what a Danish employer has to spend. The social partners are in agreement with this solution (Bruun/Jonsson 2010: 22). The European regulations strongly limit possibilities for action but finally seem to leave some space for national solutions in a limited context.

4.3 Impacts of the ECJ jurisdiction on Rüffert and Luxembourg

When the ECJ in the German Rüffert case considered it incompatible with the free movement of services of Art. 56 TFEU (ex Art. 49 EC) to attach the condition to public procurement contracts that collectively agreed wage structures should be adhered to (which are not universally applicable), the ECJ ignored that the German institute of “Tariftreueerklärungen” is closely related to the German legal system as well as to the system of labour relations and the German system of wage

setting by collective agreements (Kocher 2008b: 1042). If the method of “a softer generally binding declaration” like the one chosen in the German system - to cover only parts of business activities of the relevant companies with public procurement acts of the German Laender (Däubler 2008: 7) – is prohibited in all cases with connection to enterprises with posted workers, thus relevant parts of the German system of industrial relations are ignored and precluded.

After the ECJ decision on Ruffert, German courts consequently applied this judicature and rejected obligations that bind service providers to pay their employees according to collective agreements laid down in public procurement provisions (e.g. OLG-Düsseldorf, Vergabesenat, 8.12.2008, VII-Verg 55/08 or Vergabekammer Bezirksregierung Arnsberg, 21.08.2008, VK 16/08). Laender governments issued official decrees, that the respective public procurement acts should no longer be used.⁵

Nevertheless the procurement acts of the German Laender were not completely invalid but rather not applicable in situations with EU-dimensions (Bücker 2010: 38). Anyhow, all German Laender with similar regulations reacted and started to change their statutory public procurement provisions.

For a time it appeared as if the German institute of “Tariftreueerklärungen” would be dead, but by degrees new solutions based upon more or less the same idea of social clauses in public procurement contracts which are compatible with EU-law were developed by the federal states. However, regulatory framework and regulatory detail of individual laws of the German Laender differ. Some Laender now demand a commitment of applicants for public contracts to adhere to generally binding collective agreements, e.g. the public procurement act of the German Land of Lower Saxony (of 15.12.2008), which refers to generally binding collective agreements of the construction sector – this is compatible of course with Art. 3 (1) PWD. Compatible with European law as well are the public procurement acts of Berlin (of 22.07.2010), Bremen (of 24.11.2009), Hamburg (of 27.04.2010), Saarland (of 15.09.2010) and Rhineland-Palatinate (of 01.12.2010) which

⁵ Procurement legislation in Germany falls within the competence of individual federal states (Art. 72 and 74 of the German constitution). For further information see: Walter 2010: 15-28.

refer to the branches with collective agreement declared generally binding by the German posted workers act (ArbeitnehmerentsendeG). Consequently there is a wage floor for public procurement contracts with EU-dimension in the 10 branches of the posted-workers-act: construction industry, construction related trade areas like roofers, electrical trades or painters' crafts, building cleaners, waste management, industrial laundry, special mining, care services, money and valuables as well as the private security industry.⁶

Similar legislative proposals exist in the Laender of Brandenburg (bill on public procurement of 01.04.2011), Thuringia (of 21.09.2010), Mecklenburg-West-Pomerania (of 02.03.2011) and North Rhine-Westphalia. Therewith only service providers and goods suppliers are to be chosen for public contracts who assure to pay their employees at least according to the minimum wages declared generally binding by the posted workers act.

Of course, one may ask what advantage this has, as companies in any case are obliged to adhere to binding law (and therefore to generally binding collective agreements). It is argued that public procurement management provides the norms with further measures and possibilities of monitoring and sanctions.

However, there is no general minimum wage level in this approach in the execution of public contracts. Therefore the public procurement acts of some German Laender codify a minimum wage themselves (without limitation on certain industry sectors) which service providers have to abide by: the public procurement acts of Berlin [§ 1 (4)] and Bremen [§ 9 (1)] stipulate 7,50 €/hour as minimum wage rate,⁷ likewise the draft bill of Brandenburg [§ 3 (3)]. Rhineland-Palatinate determined 8,50/hour as a minimum wage in the new public procurement act of November 2010. With the introduction of a minimum wage as an award criterion for public procurement, fair conditions of competition are ensured for sectors which are not in the area of application of the postedworkers act, like mail services.⁸

As Art. 58 (1) TFEU (ex-Art. 51) codifies special rules for the transport sector, the PWD does not apply to the transport

⁶ The minimum wages in these sectors in eastern Germany range from 6,50 € to 12,41 € (for further information see Schulzen 2010: 5).

⁷ A declaration of compliance with the minimum wage of § 9 (1) of the public procurement act of Bremen though is not required for public procurement contracts with EU-dimension.

⁸ The minimum wage regulation of the mail services sector expired 04/30/2010.

sector with the result, that the outcome of the ECJ judgement on Ruffert is not applicable for this sector. Regulation (EC) No. 1370/2007 rather formulates in the recital No. 17: “to avert the risk of social dumping, competent authorities should be free to impose specific social and service quality standards.” Therefore for public transport the traditional system of “Tariftreueerklärungen” to attach the condition to public procurement contracts that collectively agreed wage structures should be adhered to may be used (as it was practised before Ruffert, for further information see: Schulten 2010: 6 ff.).

The following German Laender do not have any kind of social clauses in their procurement legislation (or do not apply them any longer): Bavaria, Baden-Württemberg, Hessen, Saxony-Anhalt, Saxony and Schleswig-Holstein. With the governmental change in Baden-Württemberg⁹ it is very likely that the Land will adopt a public-procurement act with provisions on “Tariftreue” as well. The social-democrats already provided a draft before the elections, which refers on the one hand (in § 4) to generally binding collective agreements of the act on posted workers (Arbeitnehmerentsendegesetz) and of the act on minimum working conditions (Mindestarbeitsbedingungengesetz). Beyond that, the draft stipulates a minimum wage of 8,50 € for the branches without generally binding collective agreements (§ 3).

Like in the Nordic system concerning the Laval case, the ECJ jurisprudence on Ruffert had significant impact on labour market policies in Germany. The German system of “Tariftreue erklärungen” had to be changed and adapted. New solutions finally were found which enable the state to still limit unfair competition through its own procurement policy. But the strategy to establish a minimum wage in the procurement acts of the states is only the second best solution as it lacks the binding force of the entire pay scale (like in a collective agreement).

The ECJ judgement on Luxembourg was not subject to such controversial discussions as the previous judgements on Viking, Laval and Ruffert, which may be because the outcome of the Luxemburg Case is hardly surprising in the light of the Court’s previous case-law concerning the interpretation of the PWD. The ECJ in the Luxembourg case again excluded the application of

⁹ With the election of the German Land Baden-Württemberg the 27th of March 2011, a new coalition of Greens and Social-Democrats came into power.

any public policy provisions in collective agreements, which have not been declared universally applicable, to posted workers. In addition it was not really surprising, that the ECJ did not accept that Luxembourg declared the complete labour law including all collective agreements as public policy provisions which are applicable to posted workers. The ECJ criticism, that exceptions to the principle of Art. 3 pr. 1 subpar. 1 of the PWD have to be interpreted narrowly, may be is comprehensible. Probably Luxembourg tested with its first law on posted workers to which extent Commission and ECJ would accept its regulations.

Following the ECJ decision, Luxembourg changed its law on posted workers in such a way that only some elements in addition to those explicitly qualified as public policy provision are included, such as the minimum indexation mechanism. These modifications have been discussed with the social partners, which expressed differing views, the unions still demanded full indexation of salaries and not only of minimum levels (EIRO, 2010, p. 25).

4.4 Changes for trade union politics

If the ECJ asserts in the Viking case when exercising the proportionality test, that first the jobs and working conditions of the seafarers would have had to have been severely compromised and secondly the union would have had to have used more lenient instruments than the threat of strike and boycott, trade unions are given no prerogative of assessment. While recognizing that collective action in general could be a method of action against relocation, the court specified for the particular case in detail, which kind aspects trade unions have to consider. Therewith, the ECJ rather interferes in trade union affairs and thus fails to recognize what it means to characterize collective bargaining as a fundamental right.

Collective bargaining is the most important part of trade union politics with industrial action as the main measure of enforcement. In Nordic countries like Sweden and Finland industrial action so far has been unrestricted, there has been no obligation that industrial action must have a reasonable purpose or be proportionate (Bruun/Jonsson 2010: 17; Koch 2009: 23 ff.). In Finland the legal situation is still the same, whereas in Sweden it changed due to the judgements of the ECJ. The Swedish trade

unions were sued by the Laval company for damages because of the industrial action which had been characterized as unlawful by the ECJ. In December 2009 the trade unions were sentenced at the labour court of Stockholm to pay damages to the Laval company, as “the actual industrial actions, despite their objective of protecting workers, are not acceptable as they *were not proportionate*” (labour court judgement no. 89/09; 2009-12-02, case no. A 268/04, Stockholm – inofficial translation by Jur. Dr. L. Carlson). Although there is no direct title in EU law, the sentence establishes an original EU claim for indemnity, which is derived directly from the horizontally applicable Community law (Reich 2010: 455). Hence, as a result of the ECJ judicature for the first time industrial action of a Swedish trade union was subject to a proportionality test. It is possible that this last outcome of the Laval case was not a single court decision in Sweden but that jurisprudence in Sweden (and maybe other Nordic countries) might rather introduce a principle of proportionality based on EU legislation when interpreting national law.

If national courts like the one in Stockholm as an outcome of the judgement of the ECJ would introduce a principle of proportionality when interpreting national law on industrial action, this would change the scope of action of trade unions dramatically and the balance between the social partners would be shifted to the employer side. It is also argued, that employers in Sweden may now even use the ECJ jurisprudence as arguments to challenge the current system of industrial relations (Bruun/Jonsson 2010: 16 f.). This remains to be seen.

The Laval case shows, that if industrial action takes place in violation of Art. 49 TFEU (freedom of establishment) the employer has the possibility to successfully sue the concerned trade union – and conflicting national law offers no protection as the Swedish judicature on Laval shows. This is most likely to be a problem in transport sectors, but could apply in other sectors as well, if workers are posted to another EU country.

Industrial action therefore is fraught with the risk of massive legal costs, as another case from Great Britain shows – a risk which has increased after the discussed case law of the ECJ. Following a decision by its employer British Airways (BA) to set up a subsidiary company in another EU state, the British Airline Pilots’ Association (BALPA) decided to go on strike, as they

feared massive social consequences for their members. The strike action was, however, effectively hindered by BA's decision to request an injunction, arguing that the industrial action would violate Art. 49 TFEU. Beyond that, BA announced that they would claim damages estimated at £ 100 million per day if the strike would take place. BALPA did not carry out the strike as it would have risked bankruptcy if it were required to pay damages in such an amount plus the costs of litigation (Ewing 2009: 4). BALPA submitted a complaint to the ILO which led to the conclusion of the committee of experts concerning the violation of ILO convention 87 (freedom of association), that "*the committee observes with serious concern the practical limitations on the effective exercise of the right to strike ... (and) takes the view that the omnipresent threat of an action for damages that could bankrupt the union, possible now in the light of Viking and Laval judgements, creates a situation where the rights under the convention cannot be exercised*" (ILO, Report of the Committee of Experts on the Application of Conventions and Recommendations, Report III, Part 1 A, 2010: 209).

The final outcome of the Laval case in Sweden as well as the British example demonstrate clearly, that industrial action which has potential transborder effects is burdened now with an incalculable financial risk for trade unions which means that the scope of action of trade unions in labour disputes is reduced (Novitz 2010: 119). This might lead to lower demands on wages and working conditions.

The first effect of the media attention on the Laval case in Sweden appears to have caused that foreign service providers were increasingly willed to sign collective agreements with Swedish trade unions (Bruuns/Jonsson 2010: 28). But this is a short hand tendency. Under the new transposition law of the PWD on the long term, collective agreements cannot be enforced by trade unions. This is a significant change in the Swedish system of industrial relations and implicates a weakening of the trade unions.

5 Conclusions

It is becoming apparent that governments and legislative bodies as well as other actors like the social partners are influenced by

the law-making of the ECJ. The regulation of national labour markets is subject to greater influence from Brussels by the jurisprudence of the ECJ, as boundaries were set concerning national market-correcting measures.

Following the ECJ, member states usually only have the possibility to either expose their social standards to free competition from low-wage providers or to set up a system of generally binding collective agreements, as is the case in Spain after the status of employees by law. Countries that do not have the system of declaring collective agreements as generally binding have a problem in implementing EU regulations like in the case of the posting of workers directive, if they want to protect their workers against social dumping. It remains to be seen, whether the innovative new Danish law or the Swedish “lex Laval” based upon Art. 3 (8) PWD will be accepted by the Commission and ECJ.

Even though the German system of “Tariftreueerklärungen” had not to be abandoned completely, the solution to anchor a minimum wage in the federal procurement acts is much weaker than the original way, which obliged service providers to pay a whole range of wages of collective agreements when applying to public contracts.

The scope of action of governments, national trade unions and employers’ organizations is restricted to different degrees by the ECJ decisions. Governments and trade unions are clearly limited, when setting up rules to protect workers (or to regulate labour relations) if these rules interfere in market liberties. Moreover, the ECJ intervenes in the fundamental (union) rights of freedom of association and collective bargaining, if a prerogative of assessment of trade unions is not recognized.

Employers on the other hand, take profit of the primacy of market freedoms – this is different only in special situations e.g. if they compete with undercutting companies from other member states. Only in such cases, employers are inclined to agree to competition-limiting measures. In the Swedish debate, employers are accused of using European legislation as a tool to enforce their interests.

It remains to be asserted, that lower demands on wages and working conditions as a possible consequence of the limitation of union power and of the decreasing willingness to difficult and insecure industrial action, will result in less protection of workers

in distribution conflicts. This is not the way towards a more social Europe.

References

- Ahlberg, K. (2010). Laval case brings new Swedish law. In: *Nordic Labour Journal*, April 2010. [URL: <http://www.nordiclbourjournal.org/artikler/new-swedish-law-as-result-of-the-laval-case>].
- Bercusson, B. (2009). *Labour law and Social Europe. Selected writings of Brian Bercusson*. Brussels: European Trade Union Institute.
- Bercusson, B. (2007). The trade union movement and the European Union: Judgment day. In: *European Law Journal*, 13, 279-308.
- Blanke, T. (2008). Die Entscheidungen des EuGH in den Fällen Viking, Laval und Rueffert – Domestizierung des Streikrechts und europaweite Nivellierung der industriellen Beziehungen. In: *Oldenburger Studien zur Europäisierung und zur transnationalen Regulierung*, 18.
- Bruun, N./ Jonsson, C.-M. (2010). Consequences and policy perspectives in the Nordic countries as a result of certain important decisions of the European Court of Justice. In: Bücken, A., Warneck, W. (eds.): *Viking – Laval – Ruffert: Consequences and policy perspectives*. Brussels, ETUI Report 111, 15-28.
- Bücken, A. (2010). The decisions of the European Court of Justice in the Viking, Laval and Ruffert cases from a German legal perspective. In: Bücken, A., Warneck, W. (eds.), *Viking – Laval – Ruffert: Consequences and policy perspectives*. Brussels, ETUI Report 111, 29-42.
- Bücken, A., Warneck, W. (eds.) (2010). *Viking – Laval – Ruffert: Consequences and policy perspectives*, Brussels, ETUI Report 111.
- Däubler, W. (ed.) (2011). *Arbeitskampfrecht*, 3rd edition. Baden-Baden, § 11 (Heuschmid, *Der Arbeitskampf im EU-Recht*), Rn 104 ff.

- Däubler, W. (2008). Tariftreueklausel nach der Rüffert-Entscheidung des EuGH. Gutachterliche Stellungnahme (1-12).
- EIRO (ed.) (2010). Posted Workers in the European Union. [URL: <http://www.eurofound.europa.eu/docs/eiro/tn0908038s/tn0908038s.pdf>].
- European Trade Union Confederation (2008). Viking and Laval Cases. Explanatory Memorandum. [URL: http://www.etuc.org/IMG/pdf_ETUC_EXEC_Viking_Laval_-_expl_memorandum_7-3-081.pdf].
- Ewing, K. (2009). Decisions of the European Court of Justice: Implications for UK labour law. [URL: [http://www.etui.org/en/Headline-issues/Viking-Laval-Rueffert-Luxembourg/2-Articles-in-academic-literature-on-the-judgements/\(offset\)/15](http://www.etui.org/en/Headline-issues/Viking-Laval-Rueffert-Luxembourg/2-Articles-in-academic-literature-on-the-judgements/(offset)/15)].
- Höpner, M. (2008). Social Europe? The European Project after Viking and Laval. In: Die Mitbestimmung (English Online Issue). 2008. [URL: http://www.boeckler.de/164_92434.html].
- ITF (2011). Flags of Convenience campaign. [URL: <http://www.itfglobal.org/flags-convenience/index.cfm>].
- Ewing, K. (2009). Decisions of the European Court of Justice: Implications for the UK labour law. Institute of Employment Rights. [URL: <http://www.etui.org>].
- Koch, M. (2009). Das schwedische Arbeitsmarktmodell im Lichte des EG-Rechts. In: RdA 2009, Sonderbeilage Heft 5, 22-25.
- Kocher, E. (2008a). Kollektivverhandlungen und Tarifautonomie – welche Rolle spielt das europäische Recht?. In: AuR, 1-2, 13-18.
- Kocher, E. (2008b). Die Tariftreueerklärung vor dem EuGH. In: DB, 19, 1042-1048.
- Lorenz, F. (2010). Arbeitnehmerfreizügigkeit und Dienstleistungsfreiheit in der Europäischen Union. Bonn.
- Novitz, T. (2010). The impact of the ECJ decisions on UK industrial relations. In: Bücken, A., Warneck, W. (eds.):

- Viking – Laval – Ruffert: Consequences and policy perspectives. Brussels, ETUI Report 111, 99-120.
- Reich, N. (2010). Laval „Vierter Akt“. In: EuZW, 12, 454-458.
- Rödl, F., Stumpf, F. (2010). Einfallstore transnationaler Lohnkonkurrenz. Gutachten im Auftrag der Hans-Böckler-Stiftung.
- Scharpf, Fritz (2008): Der einzige Weg ist, dem EuGH nicht zu folgen. In: Mitbestimmung, 7/8, 19-23.
- Schömann, I. (2010). ETUI Policy Brief. In: European Social Policy, Issue 1/2010. The Lisbon Treaty: a more social Europe at last?
- Schulten, T. (2010). Stellungnahme zum Entwurf der Landesregierung für ein Gesetz über die Vergabe öffentlicher Aufträge und zur Förderung des Mittelstandes (ThürVgGMfG). Drucksache 5/1500 v. 22.09.2010. [URL: http://www.boeckler.de/pdf/ta_2010_09_stellungnahme.pdf].
- Walter, T. (2010). The practical consequences of the Ruffert decision. In: Bücker, A., Warneck, W. (eds.): Viking – Laval – Ruffert: Consequences and policy perspectives. Brussels, ETUI Report 111, 15-28.
- Warneck, W. (2010). The ECJ decisions. In Bücker, A., Warneck, W. (eds.): Viking – Laval – Ruffert: Consequences and policy perspectives. Brussels, ETUI Report 111, 7-12.
- Zwanziger, B. (2009). Nationale Koalitionsfreiheit vs. Europäische Grundfreiheiten – aus deutscher Sicht. In: RdA, Sonderbeilage, 10-22.